1972

Inga-Lill Elton v. Bankers Life & Casualty Company : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

INGA-LILL ELTON,
Plaintiff and Respondent,

vs.

BANKERS LIFE & CASUALTY COMPANY,
Defendant and Appellant.

Case No. 12993

BRIEF OF APPELLANT

Appeal from Judgment of the District Court of the Third Judicial District in and for Salt Lake County, State of Utah
Honorable Calvin Gould, *Judge*

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STATEMENT OF THE NATURE OF THE CASE

This is a suit on a group accident insurance policy covering State employees. The plaintiff, Inga-Lill Elton, is the beneficiary of a $100,000.00 policy on the life of the late Judge Leonard W. Elton and is suing for the policy amount because of the alleged accidental death of Leonard W. Elton on May 13, 1970.

DISPOSITION IN LOWER COURT

This case was tried before a jury which returned a verdict for plaintiff on April 12, 1972. Judgment was entered on May 1, 1972, and defendant's Motion For New Trial was denied by the Court on June 28, 1972.

RELIEF SOUGHT ON APPEAL

Defendant seeks a directed verdict or, in the alternative, a new trial.

STATEMENT OF FACTS

This is an action brought by the plaintiff, Inga-Lill Elton, the beneficiary on a policy of insurance designated as Special Risk Group Policy No. SR. 82508 issued to the State of Utah and covering the employees of said State (R. 1 through R. 6). The pertinent parts of the policy provide:

> The Company certifies that the Employee to whom this certificate is issued (hereinafter called the Insured Person) is insured under the above group policy against injury sustained by the Insured Person, or the Insured Person's dependents, if insured hereunder (hereinafter called Insured Dependents). Coverage is effective on the first day of the first month for which premiums are paid through payroll deductions as evidence by the records of the Employer.
>
> 'Injury' wherever used in this certificate means bodily injury occurring while the Group Policy is in force as to the Insured Person or Insured Dependent whose injury is the basis of claim and causing the loss directly and independently of all other causes and effected solely through an accidental bodily injury to the Insured Person or Insured Dependent.
>
> BENEFICIARY
>
> Loss, if any, as respects accidental death only shall be payable to the person designated

in writing and on file with the Employer. If a beneficiary designation has not been made then loss will be payable to the Estate of the Insured Person. All other indemnities are payable to the Insured Person. The Employee will be the Beneficiary of the dependents coverage.
* * * *

ACCIDENTAL DEATH, DISMEMBERMENT AND PERMANENT TOTAL DISABLEMENT INDEMNITY

When injury to the Insured Person or Insured Dependent results in loss within One Hundred and Eighty days after the date of the accident the Company will pay, based on the Principal Sum as stated in the Schedule and applicable to the person whose injury is the basis of claim, for

Loss of Life .....The Principal Sum

It is admitted by the defendant's Answer that the plaintiff is the wife of the deceased, Leonard W. Elton, who died on or about May 13, 1970, and is the beneficiary designated by the deceased pursuant to the terms of the insurance policy referred to herein. It is further admitted that said policy was in full force and effect at the time Leonard W. Elton died (R. 1-2 and 15). It is denied that Leonard W. Elton died as a result of injury as that term is defined by the policy (R. 1 and 15).

Leonard W. Elton practiced law in Salt Lake City since before World War II (R. 289). He was appointed a District Judge in the Third Judicial District in 1966 (R. 172). On February 4, 1954, Leonard W. Elton went to Dr. Robert M. Dalrymple, a

specialist in internal medicine, for a routine physical examination. As part of that examination an electrocardiogram was done which showed that Leonard Elton had at some time prior suffered a heart attack. He had damage to the heart muscle which, in the opinion of the doctor, was probably of long standing (R. 316). Dr. Dalrymple did not see Leonard Elton again until he saw him in the St. Mark's Hospital on January 9, 1969. At that time Leonard Elton had been admitted to the St. Mark's Hospital by one of the colleagues of the doctor and had suffered a stroke (R. 319). Dr. Dalrymple's definition of a stroke was as follows:

> Something happens to a blood vessel. As a result the blood supply is interrupted, and the tissue dies, just like you tie a string around your finger, it gets white and sore. This happens in the head. It all depends on what happens, if it hits a vulnerable area in the base of the brain it will kill you instantly. If it hits one side, it may affect and impair the other side. It all depends on where this vessel is damaged in the head as to what happens. So briefly a stroke is a damage to the nervous system. (R. 316)

In his opinion Leonard Elton had suffered damage to the brain in the back of the head, that part known as the cerebellum and the part which is concerned with balance (R. 320). Leonard Elton remained in the hospital until January 17, 1969. The treatment consisted of trying to increase the blood supply to his brain and keeping him from getting

complications, which would be pneumonia, paralysis, trouble with the urinary tract and that sort of thing (R. 320). As a result of the stroke Leonard Elton suffered from emotional change and stress and had difficulty balancing. He had no definite paralysis but his speech was slow at times (R. 322). After his release from the hospital, Dr. Dalrymple saw Leonard Elton on March 4, 1969, at which time he was making satisfactory progress. He was told to get rest and to take a medication designed to increase blood supply to his brain (R. 322). He was seen again on April 1, 1969, at which time Leonard Elton had returned to part-time work. The doctor continued to see him through the rest of the year during which time Leonard Elton apparently made satisfactory progress, returning to full-time employment on October 3, 1969 (R. 324). He was told to go ahead and do his work as long as he was able to but if he got overtired or overstressed to let the doctor know. On April 20, 1970, Leonard Elton came into the doctor's office for an eye infection and regular check-up at which time the medicine for the circulation was reduced because he seemed to be doing quite satisfactory. The next day, April 21st, Leonard Elton's wife brought him back into the office because he had suffered a sudden onset of dizziness. He was cold and clammy and had an astigmatism (blurred vision), which implies something wrong at the base of the brain. In the doctor's opinion he had suffered another stroke. (R. 325). The doctor suggested Leonard go to the hospital, but he elected to stay home. Leonard suffered another

spell on the 28th of April (R. 326). At that time Dr. Dalrymple did not see him but did change his medication because in his words, "I knew he was in for trouble." (R. 326). Dr. Dalrymple saw Leonard again in the office on the 2nd of May, 1970. Dr. Dalrymple said he didn't have any definite localizing signs that he had had a stroke in the sense that he could tell just where it was but that he knew from his behavior and attitude that something had happened to him that wasn't good (R. 326). He saw him again on the 9th of May, 1970, to check his condition, having heard from Leonard's wife that he had had some trouble between the 2nd and 9th. He stated he was surprised that Elton was in very good shape (R. 327). The next time Dr. Dalrymple saw him was on May 13, 1970, at the St. Mark's Hospital. At that time Leonard was unconscious, extremely weak, sweating, blue, he had been sick, and his clinical picture was that of a terminal condition (R. 328). As to his cause of death, the doctor defined the immediate cause as circulatory collapse which in turn was caused by damage to his brain which in turn was caused by the process which caused him to have the stroke (R. 329). In describing how this occurs, the doctor testified:

> Well, what happens is that people have hard arteries, and when these arteries plug up or get plugged, either something in the middle of the artery gets loose and flies in there and plugs it off, or comes from some distant point, or it could be infection such as we mentioned with the stiff neck where the patient

> might have had meningitis, which is something we had to consider, the vessels become plugged, the series of events which I mentioned earlier, without the blood supply the tissue died. In this case the tissue died. There was swelling, the brain became swollen, pushed it down in the little thing in the back of the neck, and this caused the spinal cord to swell and all the vital centers were just destroyed. (R. 330).

After Leonard Elton's death, an autopsy was done, the results of which were reviewed by Dr. Dalrymple. On the basis of that autopsy, Dr. Dalrymple said that the heart attack in 1954 had been caused by what is termed a "myocardial infarct" (R. 322), which like the stroke had been brought about by the progression of the arteriosclerosis to the point where it had closed the artery leading to the heart, and that part of the heart fed by that artery had actually died (R. 333). The doctor further found that clots had been found in the spleen and the kidney which had also been caused by small bodies traveling through the artery clogging the artery in the same manner as the stroke (R. 340). He was of the opinion that the emboli which clogged the artery in the kidney and spleen came from the heart (R. 342) but that in the case of the stroke the emboli came off of the sides of one of the blood vessels and traveled to the brain (R. 342). As to the cause of the underlying condition of arteriosclerosis, the doctor testified that the causes of that condition are hereditary, diet, lack of exercise, and he further testified the personality of the

individual involved would be a contributing factor. In that respect he said:

> [A]nd the group at the Zion Hospital in San Francisco has done a lot of work in this. In fact, there are a bunch of cardiologists in Burbank who have made reports in the literature since 1969 about the effects of personality and stress and are saying that cholesterol, fatty acids of all kinds, tobacco, and certain of these fat analysis we run now are not important, it is the personality the individual has this effect. Some people smoke and get it, others don't. The same with alcohol (R. 336, 37).

He further testified that if a person had arteriosclerosis to the extent that Leonard Elton had it, this is a continuing thing and the condition progresses (R. 342-343). From the time he saw Leonard Elton in January of 1969 until he died he never released Leonard from his care (R. 354-355) testifying that anybody who has a stroke is a sick person and should be observed. He was afraid because of his personality that he might have another stroke, and he hoped he could prevent one (R. 355). He realized that the factor which had caused the stroke in 1969 was still present in his body, and he was likely to have another stroke in the future. Given the conditions he found at the autopsy and Leonard Elton's heart condition, it was surprising to him that he survived as long as he did (R. 361).

District Judge Frank Wilkins testified that in January of 1970 Leonard was appointed Presiding Judge of the Third Judicial District. This position is

a rotating position which is generally held for a six month period by one of the ten judges assigned to the District (R. 178). The position involved supervision over the court calendar, assignments, personnel, press matters, and the assignment of cases with constitutional issues or of great public interest (R. 174). The judge usually worked from 8:30 a.m. until 5:00 p.m. each day (R. 174) and would frequently take work home at night (R. 176). However, there is nothing unusual about the position. It is just part of being a District Judge (R. 182). Nor was there anything unusual, according to Judge Wilkins, about judges working from 8:30 to 5:00 (R. 182). In fact, the position of the Presiding Judge has the advantage that he can assign the difficult cases to another judge (R. 185).

On March 26, 1970, another judge in the District disqualified himself from a case known as the "Clark Ronnow case" which involved a public official charged with the misuse of funds (R. 197). The matter was referred to Judge Elton, as Presiding Judge, for re-assignment. Mr. Ronnow had pleaded guilty to one count; it was still necessary for a judge to impose sentence on this charge and rule on the District Attorney's Motion To Dismiss the other six counts of the charge (R. 201). A large amount of publicity accompanied all stages of the proceeding (R. 202). It was customary for such cases to be transferred to a judge from another Distirct (R. 205) but Judge Elton decided to handle the matter himself (R. 204). During

the time that Judge Elton was associated with the case he received telephone calls (R. 204) which upset him (R. 297). On April 6th Judge Elton held a one hour hearing on the Ronnow case in which he passed sentence and dismissed the other six counts. He continued to receive harassing telephone calls on the Ronnow case for approximately two weeks after the sentencing (R. 297).

Judge Elton also undertook to handle litigation concerning the Sunday Closing Law which was filed on April 6, 1970, and referred to Judge Elton for assignment because it involved the constitutionality of a law and attracted great public interest. The first hearing was on April 16, 1970, in which one store sought a temporary injunction against thirteen other stores (R. 245), and it took one hour in court (R. 246). Judge Elton consolidated all these Sunday Closing Law cases for a hearing on the law's constitutionality. The Judge made himself available in Chambers for consultation for four or five hours on April 24th (Arbor Day, a State holiday) while the attorneys decided on the best method for proceeding with the case (R. 235). Judge Elton appeared drawn and haggard and looked tired at a hearing on May 6, 1970 (R. 239). Newsmen and attorneys not formally connected with the case were frequently seeking audiences with Judge Elton during this period of time (R. 275). The Judge was also handling other matters at this time (R. 276, 277). People who saw

Judge Elton daily testified that he seemed to be more tired during the middle of April than he had previously been (R. 207, 227, 239, 254, 261, 269, 276, 289). In preparation for the case, Judge Elton started spending evenings and weekends researching the constitutionality of Sunday Closing Laws, and was also skipping his lunches to conduct research.

The plaintiff, Inga-Lill Elton, wife of Leonard W. Elton, was not aware of Dr. Dalrymple's finding that Leonard Elton had had a heart attack prior to 1954 (R. 307) and testified that he had had good health up until the time of his first stroke in January of 1969 (R. 293). After that stroke she testified that his health appeared to improve until April of 1970, although he did have some impairment but he had really started to overcome this (R. 295). On April 21, 1970, he complained of dizzy spells, at which point she took him to the doctor who told Leonard that he was working too hard and that he would have to slow down (R. 299). On April 28th he had a real dizzy spell. Upon the advice of Dr. Dalrymple he stayed home for the rest of that week. On the evening of May 5, 1970, the Judge went to bed early and Mrs. Elton found him staring blankly when she looked in on him at 11:00 p.m. Mrs. Elton found that he had completely lost his memory. She and their children talked to him until about 3:00 o'clock a.m. when Mrs. Elton gave him a sleeping pill on Dr. Dalrymple's advice and put him to bed (R. 302, 303) . The Judge had refained his memory when he woke up the next morn-

ing (R. 303). He went to court and heard oral arguments on the Sunday Closing Law from 10:00 a.m. until 12:00 noon and then from 2:00 p.m. until 5:00 p.m. (R. 238. Six briefs had previously been submitted to the Judge (R. 236) on this matter. According to an attorney who participated, Judge Elton seemed alert and asked intelligent questions during the morning session but looked tired, asked few questions, and his mind seemed to wander in the afternoon (R. 239). Pursuant to the doctor's orders Judge Elton stayed home for the rest of the week (R. 304). On May 12th Judge Elton appeared very tired to his wife (R. 305) and the two attorneys who dealt with him (R. 240, 290). He made a one-sentence announcement of his decision on the Sunday Closing Law (R. 240), handled two default divorces, and spent the rest of the day trying a boundary dispute (R. 279). The stroke occurred at 8:30 a.m. the following morning, and Judge Elton was rushed to the St. Mark's Hospital where he died at approximately 10:45 a.m. (R. 328).

Mrs. Elton further testified that in each instance Judge Elton's difficulty occurred while he was relaxed or resting. The stroke in January of 1969 occurred in the evening (R. 308). The Judge had come home from work and had said he was very tired and had gone to bed. He had suffered a stroke when she returned from the store about 8:30 or 9:00 p.m.

The stroke of April 21st (or dizzy spell as Mrs. Elton chose to call it) occurred at 9:00 o'clock in the

morning following a period when Judge Elton had had a night's rest (R. 309); and on May 5th when the Judge appeared disoriented, this occurred at 3:00 a.m. after the Judge had been in bed for some time; and the final stroke of May 13, 1970, occurred after the Judge had had a full night of sleep and had decided to stay home from work for an extra hour. None of these episodes occurred following a time of excitement when the Judge was aroused or doing any physical exertion or anything of that nature and from sometime in April going on until the time of his death Judge Elton appeared to be getting more and more tired and dragging (R. 312) and gray and ashen. He became more withdrawn and moody and toward the end (according to Mrs. Elton) was really ragged (R. 313). Following Judge Elton's death, on May 14, 1970 an autopsy was performed at the St. Mark's Hospital by Drs. Robert Stewart and Shelley A. Swift. Dr. Swift, a Board Certified pathologist, was called as a witness. He testified that pathology is mainly the study of causation of disease and mechanisms producing death (R. 424) and that the primary purpose of performing an autopsy is to determine the cause of death (R. 425). In Judge Elton's case he found a healed infarction of the heart with an aneurysm formation, emphysema and congestion in his lungs, a healed infarct in the spleen, a healed infarct in the kidneys, and evidence of an old and recent infarction in the brain (R. 427). He also had general arteriosclerosis involving most of the vessels including the aorta, the heart and the brain. In addition, stones

were found in his gall bladder. He defined an infarct as an obstruction in one of the arteries leading to an organ, as a result of which the area supplied by the artery will die as a result of lack of oxygen and nutrition. He defined an aneurysm as a dilatation and went on to say:

> . . . And in the heart, when you have an infarct there, the heart is continually under pressure as the heart contract. And since the wall is weak, every time the heart contracts, there is a tendency for this scar tissue to stretch. And over a period of years the scar tissue will stretch and form a sac of scar tissue which is called an aneurysm of the heart. (R. 427).

As to the effect this will have on the circulation, he testified:

> Well, whenever you have an aneurysm present, the contracting of the heart is extremely inefficient, because the part of the heart that's involved by the aneurysm cannot contract, and therefore all of the blood that is in the aneurysmal sac stays there with each contraction rather than being expelled out as a normal heart would do, only part of the blood in the heart is expelled, and part remains with each contraction, so that it is very inefficient contraction.

He defined arteriosclerosis as a process which takes place in the arteries primarly involving the deposition of fat substances in the wall of the artery. In addition, there is a calcification which is considered secondary. The primary change is the deposition of

fat in the wall of the artery (R. 428). In Judge Elton's case this condition was most marked in the heart and the brain. We further find this as a progressive sort of disease (R. 429). As to the cause, he testified:

> Well, the entire cause isn't known for certain, but there are many things known to predispose arteriosclerosis. In the first place, arteriosclerosis involves everybody to some extent, but many people it is very mild and causes no trouble until quite late in life. But in many people it occurs quite early in life, and these people have a metabolic abnormality of the fat metabolism which predisposes to deposition of this lipid material in the arteries. So probably the most important cause is heredity. If you are born with a defect in fat metabolism, this is probably the most important single cause of it.
>
> The next most important cause is diet itself. And diet in a person that is not involved with a metabolic defect has relatively little effect on arteriosclerosis. But if you have a diabetic — I mean a metabolic defect, then diet is extremely important, and predisposes to arteriosclerosis. There are some other factors that tend to aggravate it like high blood pressure tends to promote arteriosclerosis, but these are the chief factors. (R. 429 and 430).

In Dr. Swift's opinion there was no question that Judge Elton, having had a heart attack at 43 years of age, had a metabolic defect and that this was one of the causes of his condition. In his opinion the immediate cause of Leonard Elton's death was cerebral infarction or stroke. The occlusion caused a large area

of the brain to lose its vitality and cease to function, and this together with the swelling of the tissues around the involved area produced death involving the vital centers. As to the source of the emboli which caused the occlusion in Judge Elton's case, the witness testified it could have formed in the heart and traveled to the brain, or it could have formed in the vessel which supplied the area. He further testified that the underlying cause of both the heart condition and the stroke or cerebral infarct was the underlying condition of arteriosclerosis. He testified that a person with the condition found in Leonard Elton's heart would become progressively more prone to thrombosis because of more inefficiency in circulation and that when it reached a point of shock there would be poor oxygenation in the blood, the person would be ashen in color and would tend to be tired (R. 436). As to whether or not stress might cause injury, the doctor testified that it would depend upon whether or not the stress was pathologic stress. Anything which will produce fear will produce stress. The reason for this is that the body has built in a reaction to protect the body aginst harm. So any type of psychologic stress which produces stress reaction, shock, anything that will produce shock like blood loss, burns, physical trauma, damage to the tissue, this produces pathologic stress reaction (R. 438). Increased physical activity does not produce a pathologic stress reaction nor would an

increased work load produce an injury to the organs of the body (R. 439 and 440). The fact that Leonard Elton was acting as Presiding Judge, trying lawsuits, and handled some sensitive matters would not, in the doctor's opinion, produce pathologic stress.

The plaintiff produced Dr. Clyde Null whose specialty was internal medicine and cardiovascular disease. He did not see Judge Elton personally but testified upon the basis of the hospital records, including the autopsy report (R. 364, 365). He testified that Judge Elton had had a previous myocardial infarct, an infarct in the spleen, one in the kidney and in the brain and although the emboli which caused the particular infarct may have come from different sources, either the wall of a vessel or the heart itself (R. 380), the mechanics of injury in each instance were the same, that of tissue dying as a result of an inadequate blood supply to that particular piece of tissue (R. 381). At one point in the record he felt the basic cause of Leonard Elton's death was cerebral vascular disease (R. 389) resulting in a cerebral vascular accident (R. 388) which he defined as:

> It is a steady progression of disease which is altered by certain factors as was stated. The common medical term for this is a cerebral vascular accident.

He at one point in the record did state that the work which Leonard Elton was doing at the time of his death would markedly aggravate his cerebral vascular disease (R. 377). He explained this by saying:

> There is a great wealth of clinical infor-

> mation to indicate that individuals who have arteriosclerosis who are placed under chronic stress tend to do — tend to have a much increased risk of having strokes, heart attacks, and that sort of thing, simply from the fact that stress aggravates arteriosclerosis. There is excellent medical information to indicate this on a variety of principles involved, not necessarily just in producing a blood clot, but changing the basic blood flow patterns, changing the oxygen requirements. Strokes are not just the consequence of a blocked blood vessel, they are the consequence of many, many little factors involved in the tissue and alteration in the basic tissue requirements for oxygen. And that's basically what the blood does, it takes oxygen and foodstuff to the brain for it to survive on. But various other factors are involved, and they are all altered by stress. Our bodies are such that this is a fact of life. And there is little question that individuals subjected to harrassment, stress, who are ill because of pre-existing strokes, heart attacks, what have you, or just arteriosclerosis anywhere will be made worse by this type of activity.

However, in arriving at even this limited opinion, the doctor was unaware that the only court hearing Judge Elton had had in the Clark Ronnow case lasted from fifteen minutes to a maximum of an hour (R. 385) and that the total court time he spent on the Sunday Closing Law was a total of ten hours over a period of three separate days (R. 385). He further admitted that all persons are subject to such stress in the ordinary affairs of life (R. 386), worry about their family, and in Judge Elton's case stress brought

about by the fact that he had been having strokes (R. 387). He further admitted that the stress arises not so much out of the nature of the work being performed as the personality of the individual called type A personality traits and type B personality traits (R. 394):

> . . . Type A being very agressive, hard working, striving to meet the deadline type of individual, and whom you can demonstrate without any question they have a very marked affinity for vascular disease. Type B being an individual who is more sedentary, who is less agressive, and they exclude things like you can't — people admitted to this study, they don't have diabetes, they don't have high blood pressure, the only factors different are life styles, and everything else being about the same, as close as can be determined. . . . (R. 394, 395).

Dr. Chester Powell, a physician specializing in neurologic surgery including injuries to the brain brought about by some kind of a vascular condition (R. 463 and 464) gave his opinion as to the cause of Leonard Elton's death on May 13th as follows:

> The evidence of Dr Dalrymple's observations, treating the patient, the hospital records and the autopsy report would indicate that Judge Elton suffered from a progressive disorder of the blood vessels called athrosclerosis or arteriosclerosis; more simply hardening of the arteries. This involved the arteries not only of the heart, but the arteries of the brain. The heart showed evidence of past disease, past heart attacks and complications in the anatomy of the heart as a result. The blood vessels

of the brain showed hardening with thickening of their walls, so as to decrease the opening or the channel through which the blood passed, and produced a complete obstruction on the right side resulting in an area — a large area of the brain failing to receive its blood supply. This area is called in medical terms an infarct. The tissue of the brain having lost its blood supply actually dies. The extent of this damage to the brain was such that it led to Judge Elton's death. (R. 465, 466).

As to whether or not there was anything unusual about Judge Elton's death on May 13, 1970, he testified:

> . . . This was a chronic disease which slowly progresses, producing various complications and problems incident to its effect on the blood supply in areas of the body where the arteries are involved. This condition tends to progress, and patients die in time unless some intercurrent illness or accident occurs from one of the common complications of the disease as it effects either the heart, the brain or the kidney, or some other vital organ. The evidence in the autopsy and in — otherwise concerning Judge Elton's health would indicate this was a chronic disorder which was in process for a period of at least years, with this ultimate outcome to be expected.
>
> I don't think there was anything unusual or out of the ordinary at all that he expired of brain complications of the disease. Perhaps the only unusual thing is with an aneurysm of that size in his heart, that this hadn't ruptured and caused his death before he died of the cerebral complications. (R. 467, 468).

In response to a hypothetical question asked of Dr. Powell in regard to whether or not the work load and the other stress which Judge Elton was under at the time of his death caused his death, Dr. Powell testified:

> I don't think this could be considered, from what we know of the disease and how it — how the disease produced Judge Elton's death, a factor in the immediate occurrence of his death. I don't think that the tension or work load could be considered a proximate cause of death. We know only that stress and tension have some general effect on the occurrence of arteriosclerosis. It is a medical hypothesis or theory. There is no reliable medical scientific evidence confirming this. And if it does have an effect, it is a chronic effect exerted over a period of years.
>
> Had Judge Elton died of a cerebral hemorrhage which could have been attributed to a marked rise in blood pressure, then I think we could have said that immediate tensions, work loads, stress, could conceivably have played a significant role in the death occurring under those circumstances. In this situation, I don't think that stress or strain had any immediate or specific effect on the outcome and course of the disease.

Although Dr. Chester Powell did not treat Leonard Elton, he did have occasion to see him on a few occasions prior to his death. In response to questions by the plaintiff's attorney, he testified as follows:

> A. I recollect seeing him on two or three occasions in this court building, and once or

twice on the street. I did not examine him on any of those occasions.

Q. Well, you wouldn't purport to give any diagnosis of what was wrong with him from those observations?

A. No, except that it was apparent that he was probably a chronically ill gentleman, and that changes were occurring. What they were, I couldn't have said simply from these observations.

Q. When you say chronically ill, ill of what?

A. I could see that he had lost weight, that there was a change in his posture and gait, and I wondered if he might not have some chronic disorder. For one thing, the characteristic of his gait suggested to me that he might have cerebral vascular disease.

Q. Now did I understand you to say that in answer to counsel's question that you could expect Judge Elton's death on May 13th at 9:30 in the morning?

A. I think we would have anticipated that death was imminent, and would have occurred from complications of his vascular disease, not that it would occur at any specific time or date; that it did occur at that time I think was consistent with what we know of his physical condition. (R. 473, 474).

From the question of what role stress may have played in Leonard Elton's death, the doctor testified in response to questions by plaintiff's attorney:

A. My opinion would be that stress sustained over a period of years, according to present medical evidence, probably played some

role, how much or how little, it would be impossible to say, in the development of his arteriosclerosis; generally probably played a rather specific role in the occurrence of the heart attack. But I don't think it would play any role in the occurence of the infarct.

Q. No matter how serious that stress was, or how unusual?

A. Not an immediate and direct cause and effect role. Over years, it might have had some — played some role in the development of the arterosclerosis. (R. 476, 477).

POINT I.

THE POLICY IN THE PRESENT CASE CLEARLY REQUIRES THAT THE INSURED MUST DIE AS A RESULT OF AN ACCIDENTAL BODILY INJURY.

The policy involved in the present case states that:

> The Company certifies that the Employee to whom this certificate is issued . . . is insured under the above group policy against *injury* sustained by the Insured Person . . .
>
> 'Injury' wherever used in this certificate means bodily injury occurring while the Group Policy is in force as to the Insured Person . . . whose injury is the basis of claim and causing the loss directly and independently of all other causes and effected solely through an *accidental bodily injury* to the Insured Person . . . (Emphasis added)

The policy in the present case clearly contains

the word "accidental," which is sufficient to require proof that the insured died an accidental death. Any construction to the contrary is clearly erroneous since it is in direct contravention of past decisions of this Court and sound rules of construction.

The past decisions of this Court clearly indicate that the word "accidental" in the insuring clause is sufficient to establish that an insurance policy only covers injuries caused by accident. In *Richards v. Standard Accident Insurance Company*, 58 Utah 622, 200 P. 1017 (1921), relied on by plaintiff in her trial memorandum, the Court considered a policy which insured against

> (L)oss resulting from bodily injuries effected directly, exclusively and independently of all other causes, through accidental means . . . Id. at 1018.

The Court held that the beneficiary of the insurance policy could recover where the insured, a mining engineer, died from sunstroke in the desert while returning from a trip on foot to a mining prospect, which was represented to him as being only six instead of ten miles distant; such misrepresentation or miscalculation of distance being an accidental, unexpected, or unseen event. In doing so the court held that the plaintiff must prove that the death was accidental. The court relied on the words "accidental means" since there was apparently no disease exclusion in the policy. The court said:

> If the sunstroke in the present case was not, in and of itself, an accidental means, as we

think it was, it, nevertheless, according to the undisputed evidence, resulted from accidental means or an accidental cause. An 'accidental means' is a means or a cause that is unexpected, unforeseen, and fortuitous; it is an accidental event, unexpected and unforseeable, an occurrence that is unexpected and unforeseen.

The authorities generally hold that death or injury does not result from accident or accidental means within the terms of an accident insurance policy where the injury or death is the natural and probable result of the insured's voluntary act unaccompanied by anything unforeseen except the death or injury. The authorities cited by appellant in support of this proposition may be found in 7 A.L. R. 1131, 1132, and I.C.J. 427-429. However, it is a well-established exception to the above rule that where death or injury is not the natural and probable result of a voluntary and intentional act by the insured, or something unforeseen or unexpected or unusual occurs in the act which precedes the injury, then the injury is the result of accidental means. Supporting this proposition numerous authorities are cited by the annotator in 7 A.L.R. 1132, 1133. The leading case on the subject is that of *United States v. Barry*, 131 U.S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, in which it is held:

"The term 'accidental' was used in the policy in its ordinary popular sense, as meaning, 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected'; that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by

accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

In *Western Commercial Travelers' Ass'n v. Smith*, 85 Fed. 401, 29 C.C.A. 223, 40 L.R.A. 653, Judge Sanborn gives a clear definition of 'accidental means' as follows:

"The significance of this word 'accidental' is best perceived by a consideration of the relation of causes to their effects. The word is descriptive of means which produce effects which are not their natural and probable consequences. The natural consequence of means used in the consequence which ordinarily follows from their use — the result which may be reasonably anticipated from their use, and which ought to be expected. The probable consequence of the use of given means is the consequence which is more likely to follow from their use than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of these means, an effect which the actor did not intend to produce, and which he cannot be charged with the design of producing under the maxim to which we have adverted, is produced by accidental means. It is produced by means which

were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means." Id. at 1022, 1023.

In *Thompson v. American Casualty Company*, 20 Utah 2d 418, 439 P.2d 276 (1968) the Court again required a showing of accidental death when the only policy language relied on was the simple phrase "accidental means." Id. at 419.

Since this Court has repeatedly held that the phrase "accidental means" is sufficient to require the plaintiff to show that the insured's death was "accidental," it is important to dispel the notion that this phrase has any greater significance than the phrases "accidental bodily injury" or "accidental result." This was done over 25 years ago by Justice Wolfe in *Handley v. Mutual Life Insurance Company of New York*, 106 Utah 184, 147 P.2d 319, 152 A.L.R. 1278 (1944), in which the insured had been operated on for a hernia. The operation was an apparent success but the patient died three weeks later of a pulmonary embolism caused by a blood clot which had formed behind the site of the operation. The beneficiary sued for recovery on the theory that the formation of this clot was an unusual, unforeseen and unexpected result of such an operation since proper operating procedures had been followed and no apparent mishaps had occurred during the operation. The policy requir-

ed that the insured die from "accidental means." In affirming the verdict for plaintiff, the Court interpreted the phrase "accidental means" and rejected the defendant's contention that this language required the cause of the injury (i.e. the operation) to be unexpected or unforeseen. Justice Wolfe said:

> . . . This court has definitely gone on record as construing the provision under discussion and equivalent provisions as reaching cases where the death or disablement is the unexpected result, intended acts making the result itself, rather than the means, the accident. Id at 191, 147 P.2d 322.

The net result of these two cases is to require the plaintiff to prove that the injury or death of the insured was accidental in that it was brought about by an unexpected event or is not the natural and probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the event.

It is clear that, for 25 years, Utah law has made no distinction between the phrases "bodily injury effected solely through . . . accidental means" and "bodily injury effected solely through an . . . accidental event." Under Utah decisions these phrases clearly had the same legal effect. In the present case the policy states that the insured must die from "an accidental bodily injury." This is synonymous with the phrase "accidental event" since a bodily injury is obviously an "event." Therefore, the three phrases mentioned in the above paragraph clearly have the same

legal significance and clearly require the beneficiary to prove that the decedent died from an "accident."

For 25 years there has been no ambiquity about the meaning of the word "accident" in Utah law. There was no ambiquity about its meaning when this policy was written and sold to Utah State employees. The law interpeting the policy language used in this policy should not be changed after the parties have relied on that law in drafting the policy.

The plaintiff also contends that the word "accident" must be construed strictly against the insurer. However, in *Handley*, supra, this Court stated that an insurance contract should only be construed against the insurer when it contains ambiguities. Id. at 1282. In light of the extensive Utah law defining the word "accident," it was not ambiguous when it was inserted in the policy involved in the present case.

In the present case the insurer obviously intended to restrict recovery to situations where the decedent died from "accidental" death. The Court should not change the contract after it has been written. *Couch on Insurance*, 2d, Section 15:37 says:

> It is the duty of the courts in interpreting insurance contracts to enforce and carry out the contract which the parties have made, without importing anything into the contract by construction contrary to its express terms, or the plain meaning of its terms, or attempting to make a better or different contract. . . .

Plaintiff relies heavily on the differences in the

language between the insurance contract in the present case and the "classical accident policy." There are several clauses sometimes found in accident policies which were absent from Judge Elton's policy. There was no requirement that the cause of injury be "external and violent;" also, there was no exclusion specifically barring recovery from deaths contributed to partially by disease. Plaintiff than argues that, because the policy lacks these clauses, the clause requiring that the injury be accidental is somehow rendered ineffective. The fallacy of this argument is obvious. These clauses are separable, and the absence of one clause does not weaken the effect of the others. The requirement of "accidental bodily injury" is in the policy and cannot be eliminated by strictissimi juris or any other doctrine the plaintiff may rely on. The presence of the accidental bodily injury requirement in the policy is even more compelling in light of the fact that so many of the other elements of the classical accident policy were omitted.

In interpreting the contract in the present case, plaintiff relies heavily on the absence of a clause specifically excluding disease. Because of the absence of this clause, the plaintiff claims that:

> Since the policy in the case at bar contained no exclusion concerning the type of injury that plaintiff died from, the law is clear that it is no defense to claim that the death would have occurred ultimately, even without the accident or to claim that it was a disease or dis-

ability which ultimately caused the death. (R. 128).

This over-states the effect of the absence of the specific disease exclusion. Two different interpretations have been made on the effect of this language. First, absent such an exclusion, the courts have held that recovery may be denied under this language if an insured died from a disease which was so chronic and progressive that it could be expected to be a source of mischief. In *McMartin v. Fidelity & Casualty Co. of New York*, 264 N.Y. 220, 190 N.E. 415 (1934) the decedent was insured "against disability or death resulting directly and independently of all other causes, from bodily injuries sustained through external, violent and accidental means." The insured had suffered from chronic and progressive nephritis (an inflammation of the kidneys) when he was involved in an automobile accident which caused rib damage. Although the pain subsided after five or six days, the insured died of nephritis twenty days after the accident. Id. 415. In affirming the judgment for defendant by the trial court, the appellate court construed the policy and said:

> [I]t is appropriate to paraphrase as follows a recent statement of the rule by Mr. Justice Cardozo: Under a policy phrased as this one, the insurer may be relieved of liability if an idiosyncratic condition of mind or body predisposing the insured to injury is so acute as to constitute a disease. . . . (Justice Cardozo said in his dissenting opinion in a prior case that) The disease or the infirmity must be so consid-

> erable or significant that it would be characterized as disease or infirmity in the common speech of men . . . of such quality or degree that in its natural and probable development it may be expected to be a source of mischief. Id. at 415.

In applying the language of that policy to the facts of that particular case, the court said:

> Nephritis existent for at least three years, chronic and progressive, may not with any fitness of language or with any sense of reality be described as a mere predisposing tendency. It is a condition which in its natural and probable development may be expected to be a source of mischief, and so a disease; and if it were mentioned as inflammation of the kidneys instead as of nephritis, the ordinary man in his common speech would unquestionably call it a disease. Id. at 416.

The nub of defendant's contention on this point is that, although the policy in the present case lacks a specific disease exclusion it still requires that the death be accidental. Therefore, the plaintiff may not recover under a policy containing this language when the disease is the primary cause of death.

Second, even if the interpretation pressed by the plaintiff is accepted, the accident is still required to be the primary cause of death before recovery can be granted under an accident policy which lacks a disease exclusion. In *Couch on Insurance*, 2d, Section 41:380 it says:

> There is a distinction between an accident

policy covering loss "resulting directly, independently and exclusively" from other causes and a similar policy containing the additional phrase excluding disabiilty "wholly or in part, directly or indirectly, from disease or other bodily infirmities," or phrases of like nature. The phrase "resulting directly, independently and exclusively" refers to the efficient, substantial, and proximate cause of the disability at the time it occurs. On the other hand, a policy containing the additional phrase set out above refers to another contributory cause, whether proximate or remote. Where, under a policy containing only the first phrase, the accidental injury acts upon a pre-existing disease causing total disability which except for such disease would not have occurred, the injury is deemed to be the proximate cause of the disability entitling recovery. But it is otherwise where the policy contains the additional phrase indicated above. Of course, the result would be otherwise in this latter situation where the disease resulted from the accidental injury or if the accidental injury caused the disablement independently of the disease. *Otherwise stated, where the policy covers accidental death resulting directly and independently of all other causes through external, violent, and accidental means, liability arises if the accident is the moving, sole, and proximate cause of death, even though a pre-existing disease or physical infirmity is a necessary condition to the result.* However, where the insurer's liability is further restricted by a clause avoiding liabiilty where death results directly or indirectly from disease or from bodily or mental infirmity, it is not sufficient to create liability to establish a direct casual rela-

> tion between the accident and the death or disability, but the plaintiff must show that the resulting condition was caused solely by external and accidental means, if the evidence points to a pre-existing infirmity or abnormality which may have been a contributing factor, the burden is upon him to produce further evidence to exclude this possibility. (Emphasis added)

Therefore, it is clear that the authorities require that the plaintiff, as a prerequisite to recovery under the policy language in this case, must prove that Leonard Elton died as a result of an accidental bodily injury in the sense that the event which produced the injury was in itself unforeseen and unexpected or, if not, the results of the event must be the unnatural or improbable consequence of the means which produced it, an effect which does not ordinarily flow and cannot be reasonably anticipated from the means or event. The plaintiff overstates the law when she claims that ". . . it is no defense to claim that the death would have occurred ultimately, even without the accident or to claim that it was a disease or disability which ultimately caused the death." (R. 128). This is misleading because under either policy it must be proven that the accident is the moving, sole, and proximate cause of death, even though a pre-existing disease or physical infirmity is a necessary condition to that result.

POINT II.

AS A MATTER OF LAW, JUDGE ELTON'S DEATH WAS NOT ACCIDENTAL AND BE-

CAUSE IT WAS FORESEEABLE AND NOT UNEXPECTED.

As has been seen from the authorities cited under Point I, the plaintiff has the burden of proving in this case that Leonard Elton died as a result of an accidental bodily injury. This burden could have been met by proving that an unexpected event occurred which produced the injury. However, if the event itself is not unexpected, the plaintiff would be required to prove that the injury was the unexpected result of the intended act. In this case the plaintiff relies upon the evidence that Judge Elton was acting as Presiding Judge of the Third Judicial District and was handling the case of a public official charged with the misuse of funds and a question involving the constitutionality of the Sunday Closing Law.

There is no element of chance, unexpectedness or accident about a judge voluntarily undertaking to act as Presiding Judge or to try cases involving constitutional issues or public officials. If we assume, for the purpose of argument, that the stress and strain Leonard Elton was under at the time of his death had something to do with contributing to the cause of his death, the evidence failed to meet the burden of proof because it failed to show that his death or injury was not the natural and probable result of a voluntary and intentional act of Judge Elton.

In *Richards v. Standard Accident Insurance Company*, supra, the court allowed recovery on two grounds: First, that the trip was 8 miles longer than

the insured had anticipated and, second, that the sunstroke was an unusual event in an arid climate. This is the first case in which the court stated that death or injury from a voluntary act can be an accident. The court stated clearly that a death or injury was "accidental" when it was the unforeseen and unexpected result of an act, regardless of whether the act was accidental or voluntarily committed by the insured.

This test for accident has subsequently been applied by this court on numerous occasions. In *Whatcott v. Continental Casualty Company*, 85 Utah 406, 39 P.2d 733 (1935) the insured was protected against "loss of life . . . resulting from a personal bodily injury which is effected solely and independently of all other causes by happening of an external, violent and purely accidental event." Id. at 734. Novocain was injected into the insured's spine as an anesthetic during a routine appendectomy. Unknown to the insured or his doctors, he suffered from a hypersusceptibility to novocain and died on the operating table when his body's reaction to the drug caused respiratory failure. The court reversed the verdict for the defendant in the trial court and remanded for new trial. The trial court held that this could be an accidental death because the involuntary acts of submitting to the incision or the anesthetic resulted in an unexpected and unforeseen result, the insured's death.

The rule is again applied in *Handley v. Mutual*

Life Insurance Company of New York, 106 Utah 184, 147 P.2d 319 (1944), in which the insured had a life insurance policy which had a provision which provided double indemnity if "the insured died as a direct result of bodily injury effected solely through external, violent and accidental means, independently and exclusively of all other causes . . ." Id. at 187, 14 P.2d at 320. The insured suffered a hernia when a steel bar hit him in the groin. The routine operation was subsequently performed to repair the hernia and there was no deviation from standard operating procedures. Nineteen days after the operation the insured died from a pulmonary embolism caused by a blood clot which had formed behind the operation site. The formation of this clot was an unusual occurrence. The court affirmed the trial court's decision for the plaintiff.

In *Kellogg v. California Western States Life Insurance Company*, 114 Utah 567, 201 P.2d 949 (1949) the insured was covered under a policy which protected against "bodily injury . . . which is effected exclusively and wholly by external, violent and accidental means, of which there is a visible contusion or wound on the body . . ." Id. at 950. This was the double indemnity clause of a life insurance policy. There was also a specific clause excluding death resulting "directly or indirectly, from . . . physical or mental infirmity . . . illness or disease of any kind . . ." Id. at 950. The insured had been operated on in 1944 for a perforated duodenal ulcer and, immediately af-

ter the operation, he suffered shock and was in critical condition. He recevored, and in 1945 underwent an operation for ventral hernia which apparently developed from the first operations. He was an extremely muscular man and in making the incision the surgeon discovered 17 adhesions which greatly prolonged the time required to perform the operation. The operation took six hours and the insured suffered from loss of blood and body fluid, but there were no unusual occurrences. Within eight hours after the second operation the insured was in post-operative shock and he died the next day. The court affirmed the trial court's finding that the death was not accidental. It said that the post-operative shock and ensuing death were foreseeable in light of the insured's history of post-operative shock one year before and the 17 adhesions which the surgeon found after he anesthetized the patient and started the second operation.

Therefore, in the *Handley* and *Whatcott* cases this court held the death to be accidental when there was no prior medical history which would indicate that the insured might suffer injury resulting in death from his voluntary act in submitted to the operation. However, this court has refused to hold that a death was accidental when the insured's prior medical history and the medical discoveries made by the surgeon at the time of the operation indicated that the type of injury that the insured suffered from was not unexpected.

Under this test, Leonard Elton's death on May 13, 1970, was clearly not an "accident" in light of Dr. Powell's statement that he looked like a man with cerebral vascular insufficiency several weeks before his death, Mr. Harold Waldo's statement that Judge Elton looked very tired on the afternoon of May 6th and Dr. Dalrymple's statements that Judge Elton suffered from a stroke on April 21st (R. 325), a cerebral vascular incident on April 28th (R. 326) and loss of memory on May 5th (R. 302, 303). Also, Dr. Dalrymple stated that he increased Judge Elton's medication on April 28th because "I knew he was in trouble" (R. 326), and the doctor suggested on April 21st that the Judge go into the hospital (R. 325). In light of this extensive history of cerebral vascular trouble in the weeks before his death, the fatal stroke on May 13, 1970, was not unexpected and, therefore, not an accident.

Taking the testimony of the plaintiff's expert, Dr. Clyde Null, in the light most favorable to the plaintiff, and it must be remembered that he did not testify that the stress which Leonard Elton was under at the time of his death caused his death but simply that it may have markedly aggravated his basic disease, the purport of his testimony seems to be that persons who are placed under chronic stress, or, that is, stress for a long period of time, have an increased risk of having strokes and heart attacks, simply from the fact that stress aggravates arteriosclerosis. This is simply to say that the natural and probable re-

sult of the stress which Leonard Elton may have been under at the time of his death is that it would aggravate his basic disease of arteriosclerosis; or in other words, the natural and probable result of a man with the basic condition of Leonard Elton subjecting himself to stress is that it will aggravate his basic condition. To put it in a common vernacular, if a person as sick as Leonard Elton was voluntarily subjects himself to a heavy work load, the natural, probable and foreseeable result is that his condition would be worse than if the stayed home and rested and that he might die from that condition sooner than if he had elected to stay away from work. This presumes, of course, that Judge Elton was under a great deal of stress at the time of his death, which is not borne out by the record, since the evidence shows that Judge Elton was taking considerable time off from work immediately prior to his death on May 13, 1970. Moreover, from the time actually spent in court, the cases which Judge Elton was handling at the time of his death do not appear to have been of the magnitude claimed by the plaintiff. Therefore, it is seen that there was nothing accidental about Judge Elton's death because there was neither an accidental event which caused his death nor an unforeseen or unexpected result from an act which Leonard Elton voluntarily undertook prior to his death.

POINT III.

EVEN IF JUDGE ELTON'S DEATH WAS "ACCIDENTAL," RECOVERY MUST BE DENIED BECAUSE DISEASE, NOT ACCIDENT, WAS

THE PREDOMINANT CAUSE OF HIS DEATH

In *Tomaiuoli v. United States Fidelity And Guaranty Company*, 75 N.J. Super. 192, 182 A.2d 582, the insured was covered under apolicy protecting against "loss resulting directly and independently of all other causes from accidental bodily injuries. . . ." Id. at 584. The policy also contained a clause providing that:

> This policy does not cover any accident or loss caused or contributed to by . . .
>
> (3) disease, or medical or surgical treatment therefor, or bacterial infections (except pus-forming infections occurring through an accidental cut or wound) . . . Id. at 584.

The decedent was involved in a minor automobile accident in which no one was injured, but he became extremely emotionally upset, slipped and fell and died of a heart attack. The plaintiff sued on the theory that the automobile accident caused the heart attack and, therefore, the insured died from accidental bodily injuries. In affirming the trial court's decision for the defendant, the court relied on the language requiring that the death occur "directly and independently of all other causes." Id. at 588. The court reviewed the New Jersey decisions on this question and concluded that the insured could not recover when an accident combined with an active, progressive disease and caused the insured's death; however, the insured could recover if the accident triggered a latent inactive disease and thereby caused the insured's death.

The court answered the plaintiff's contention that this construction made the policy meaningless by stating:

> . . . Common sense dictates that no reasonable person at age 72 suffering from arteriosclerotic heart disease complicated by an aneurysm and diabetes would expect to be found insurable for *life insurance purposes*, and that if under any circumstances he was able to obtain for $31 a year an insurance policy which contained a death benefit of $10,000, he would know that the benefit would be limited to a coverage area of extremely small compass. . . .
>
> Yet, the scope of coverage here was not so limited that a court should say that decedent received little or nothing for his money. There are many situations which would have required payment of the benefit by the company not withstanding the insured's physical infirmities; for example, a suddenly fatal airplane, highway, rail, steamship, or household accident, in which other persons lost their lives or were severely injured, or an accident not immediately fatal but involving the inflicting of bodily injuries on the assured from which he would probably have died, even if prior thereto he had been in a perfect state of health. It was with a view to such occurrences, or the like, that the parties bargained." Id. at 590 (Emphasis in original)

In *Herthel v. Time Insurance Company*, 221 Wis. 208, 265 N.W. 575 (1936), in which the court described the insurance policy by saying:

> The coverage clause of the policy in suit was somewhat broader than those commonly

> involved in the adjudicated cases, and insured against loss from death resulting from "personal bodily injury . . . effected directly and independently of all other causes through accidental means, . . ." The phrases "through external violence" and "directly or indirectly" commonly used in accident policies, do not occur in the clause. Id. at 576.

The insured died from a heart attack which occurred while he was pulling a boat up onto the beach. In reversing the trial Court's verdict for the plaintiff and ordering the complaint dismissed, the court said:

> . . . From the great majority of those cases and upon reason, the general rule seems fairly deducible that, if a disease or bodily condition exists and an accident occurs, to constitute the accidental means the sole cause of an injury, under policies like the one in suit, it is not necessary that the injury or the results thereof would have been as severe as they were had the disease or bodily condition not existed; but it is sufficient if the accidental means would have solely caused some considerable injury had the disease or bodily condition not existed. But, if no considerable injury at all would have resulted had the insured not been afflicted with the existing disease or condition, the accidental means cannot be considered as the sole cause of the injury. Id. at 577-78

This rule was also followed in *Alessandro v. Massachusetts Casualty Insurance Co.*, 42 Cal. Rptr. 630 (1965), in which a policy provided benefits for total disability caused by "accidental bodily injury." Id. at 631. The policy also included benefits for sickness

to which the insured was not entitled. The insured had a history of degenerative disease of his spinal discs and injured his back while leaning forward to work on an air conditioner. In affirming the trial court's verdict for the insurer, the court said:

> *If no considerable injury at all* would have resulted had the appellant not been afflicted with the existing disease or condition, then the *accident could not be considered the proximate cause of the harm,* but rather the disease must be so considered. Id. at 633. (Emphasis added)

This Court should take careful note of the fact that this recent California decision was reached under policy language identical to Judge Elton's policy, neither policy contained a disease exclusion or an "external and violent" requirement. The only policy language which the court relied on in *Alessandro* was the phrase "accidental bodily injury." Under that language alone, the court reached the very logical conclusion that the accident itself must be capable of causing some harm before recovery will be allowed under an accident policy.

In *Murasky v. Commercial Travelers Mutual Acc. Ass'n. of America,* 94 F.2d 578 (1938), the court said:

> An inference or mere scintilla was not enough to warrant the court below in the submission of the issue to the jury as to whether he had a fall due solely to an accidental cause. (Citations omitted) The rule has long been established that where pre-existing disease causes or contributes in causing death, there

can be no recovery and under such circumstances there is no issue for the jury. Id. 579-80.

This rule is not inconsistent with the Utah law on this question. The distinction between latent and active disease is recognized in *Lee v. New York Life Insurance Company*, 95 Utah 445, 82 P.2d 178 (1938), in which the life insurance policy provided double indemnity if death resulted "directly and independently of all other causes from bodily injury effected solely through external, violent and accidental causes . . ." Id. at 446, 82 P.2d at 178. It also contained a clause excluding injury caused by disease. The insured had a disease of the gall bladder which was dormant until the tongue of a loaded trailer struck him in the stomach, rupturing the gall bladder. The infection released from the ruptured gall bladder caused his death, and the court held that the sole cause of his death was the accident because the disease had been dormant and was activated by the accident.

This distinction was also recognized in *Tucker v. New York Life Insurance Company*, 107 Utah 478, 155 P.2d 173 (1945) which involved a policy identical to the one in *Lee*, supra. The insured had had high blood pressure for one year before the accident. He fell and broke his arm, aggravating his hypertension and causing a weakened artery to burst. The court refused to allow double indemnity, saying that the disease was active and worked with the accident to cause death and that, therefore, the accident was not the sole cause of death.

All of the doctors who testified in this case agreed that Judge Leonard Elton suffered a stroke or died as a result of a cerebral thrombosis which cut off the supply of blood to a vital area of his brain and caused swelling shutting down the vital functions of his body (R. 465, 329, 375, 431). All agreed that the cerebral thrombosis or the clotting of the vessel in Judge Elton's brain was in turn caused by the disease of arteriosclerosis (R. 375, 384, 342, 432, 465). There was no dispute that this disease had progressed to the point that, 16 years prior to his death, it had caused a heart attack when an infarct occurred in one of the vessels leading to the heart muscle. The autopsy also revealed that, prior to his death, infarcts had occurred in the spleen and kidney as well as the brain. The progression of the disease is evidenced by the increased number of episodes, starting with the stroke experienced by Judge Elton in 1969 shortly before his death. Dr. Dalrymple recognized this as is apparent from his testimony to the effect that from the first time he saw Judge Elton in January of 1969 until the time he died, he never released the Judge from his care. He was in the language of Dr. Dalrymple a sick man (R. 331). The doctor was afraid because of Judge Elton's inherent personality that he might have another stroke and was treating him with the hope that he could prevent one (R. 355). He recognized that the factors which had caused the heart attack prior to 1954, the infarcts in the spleen and kidneys prior to 1969, and the stroke of 1969 were still present in Judge Elton's body and that he was

likely to have another stroke in the future (R. 355). The progression of the disease was also evident to lay witnesses who observed the Judge from the time of his stroke until the time of his death in 1970. The fact that, from mid-April, 1970, he was tired (R. 207, 227, 239, 254, 261, 269, 276, 289), ashen in appearance and that his mind often wandered; that he had dizzy spells (R. 299, 300) and periods when he lost his memory (R. 302) evidenced the mental and physical deterioration which was taking place by reason of an inadequate blood supply (R. 346). All of the doctors agreed that a condition of arteriosclerosis is brought about by a metabolic defect which causes materials to be deposited upon the walls of the arteries and that this is an inherited condition. (R. 429, 466, 324). All agree that given this condition, diet, lack of exercise and smoking may be factors which affect but do not cause the condition. (R. 335, 336, 430, 466). There was a conflict of testimony as to whether the type of stress which Leonard Elton was under at the time of his death may be a factor which affects the condition. Dr. Shelley Swift and Dr. Powell both testified that the type of stress which it is claimed Judge Elton had at the time of his death would not and could not cause arteriosclerosis and that the only type of stress which could have brought about the death of Leonard Elton would be that type of stress which would produce psychologic stress producing shock, like loss of blood, burns, physical trauma or sharp rise in blood pressure which produce a pathologic stress reaction. All doctors agreed that if stress is to have any-

thing to do with the cause of the basic condition, it must exist over a period of time. Dr. Clyde Null describ this as chronic stress. Dr. Powell said stress sustained over a period of years probably play some role. If we are to accept the testimony of Dr. Null, the stress which it is claimed markedly aggravated the condition of arteriosclerosis which Leonard Elton had was not due to any accident or the nature of the work which he was performing but by reason of inherent personality of Leonard Elton, he being what Dr. Null described as a "type A individual," an aggressive, hard working, striving individual. In other words, stress over a period of years might have and probably would have more effect on Leonard Elton than other individuals, but this is just another way of saying that Leonard Elton inherited a defect or, if you prefer, an emotional defect which made him particularly susceptible to the disease of arteriosclerosis. It should be noted that the strokes or episodes which preceded Judge Elton's death occurred not during times of emotional excitement but rather when he was resting or had been resting, which would be the time in which his blood was traveling at the lowest rate and clogging most likely to occur. Even if we accept the plaintiff's thesis that the particular stress which Judge Leonard Elton was under in the months preceding his death had something to do with his death, it was, giving the plaintiff every benefit of the doubt, only a contributing factor and not the moving, primary or proximate cause of his death. Nor does this type of stress constitute an unexpected event, happen-

ing or accident inflicting bodily injury. It is, therefore, apparent that the plaintiff failed to prove under any view of the evidence that Leonard Elton died as a result of accidental bodily injury directly and independently of all other causes.

POINT IV.

THE JURY INSTRUCTIONS WERE CONTRADICTORY AND FAILED TO FAIRLY PRESENT THE ISSUES TO THE JURY TO THE PREJUDICE OF THE DEFENDANT

The Instructions in this case were framed in such a manner as to make it appear to the jury that if Leonard Elton was working hard at the time of his death and that this in some way contributed to or hastened his death, plaintiff could recover under the insurance policy with the defendant. This is particularly illustrated by the Court's Instruction No. 10, which states:

> You are instructed that if you believe by a preponderance of the evidence that Leonard W. Elton was suffering from a cardiovascular disease, and that as a Judge he, at the time of his death, was under unusual mental stress and strain caused by an unusual amount of work or work causing unusual mental stress and strain, and that by chance, and without design, consent or cooperation of Leonard W. Elton, the stress or strain aggravated that disease and proximately caused a cerebral thrombosis and that cerebral thrombosis under those circumstances, was the injury which proximately caused the death of Leonard W. Elton, then your verdict should be in favor of the plaintiff and against the defendant. (R. 80)

This Instruction, especially when read in conjunction with the other Instructions which were given by the Court, is erroneous in a number of respects. In the first place, it fails to tell the jury that Judge Elton had to die as a result of an accidental bodily injury or the unforeseeable result of an intentional act, and it attempts to identify mental stress and strain caused by an unusual amount of work as an accident. It further tells the jury that the stress or strain need only contribute to the death of Leonard Elton in the sense that it aggravated his cardiovascular disease and does not tell them that the mental stress and strain must be the moving, sole, and proximate cause of the injury resulting in death. The only words attempting to define accident in this instruction are the words "and that by chance, and without design, consent or cooperation of Leonard W. Elton" the unusual mental stress and strain caused his death. This is completely inadequate as a definition of "accident" under the Utah law. "Accident" has little to do with the design, consent or cooperation of the insured. The critical issues are whether the event itself is accidental or whether the injury was the foreseeable consequence of the insured's acts. Nowhere in this Instruction is foreseeablity alluded to. Nor was the term "accidental bodily injury" or "accident" ever defined by the Instructions. The closest they come to a definition was in Instruction No. 9 which instucted the jury as follows:

> You are instructed that accidents are of two kinds; those that are not the result of hu-

man action and those that are such result. Therefore, an accident is an event which happens without any human agency, or, if happening through human agency, an event which under the circumstances is unusual to and not expected by the person to whom it happens. (R. 79)

This Instruction simply tells the jury that there are two kinds of accidents — those which are the result of human action and those which are not the result. The term "accident" implies some type of a happening or event and not just something unusual. At no time was this brought out even though the defendant requested in its Requested Instruction No. 4, which was denied, that the Court so instruct the jury. Instruction No. 4 reads:

> In order for the plaintiff to recover in this action, the plaintiff must prove by a preponderance of the evidence that the death of Leonard Elton on May 13, 1970, came about by reason of some unexpected event or occurrence which in and of itself and independently of all other causes caused sufficient damage to one of the organs of his body that he thereafter died as a result of such event or occurrence and injury. (R. 62)

The Court refused to admit the policy of insurance in evidence (R. 38). In fact, the Court told the jury in Instruction No. 7 that the exact wording of the policy was unimportant and refused to give the defendant's Requested Instruction No. 3, which attempted to inform the jury on the type of policy which was involved; to define the terms of the policy; and to explain the circumstances under which the plain-

tiff might be entitled to recover the benefits of the policy. In Instruction No. 8, the Court instructed the jury: "You are instructed that a cerebral thrombosis is a bodily injury." (R. 78). This is incorrect in that the cerebral thrombosis in this case was not a bodily injury, implying that the "accidental bodily injury" which the case concerned might be proven simply by proving that Leonard Elton died as a result of cerebral thrombosis, which was not the case. The accidental bodily injury which the case was concerned with was that event or occurrence which brought about the cerebral thrombosis and not the cerebral thrombosis itself. The Court's Instruction No. 16 instructs the jury:

> Where two causes combine to bring about an injury and either one of them operating alone would have been sufficient to cause the injury, either cause is considered to be a proximate cause of the injury if it is a material element and was a substantial factor in bringing it about. (R. 86)

As has been seen from the authorities in the foregoing part of the defendant's brief, it is not sufficient for the plaintiff to merely prove that Leonard Elton may have died either as a result of a pre-existing disease or as a result of an acidental bodily injury. She had the burden under this policy of insurance of proving that the alleged accidental bodily injury caused his death independently of other causes even though it may have acted through a pre-existing condition in doing so. In Instruction No. 12, the jury was instructed:

You are instructed that it is no defense to this action that a normal person would not have died as a result of the injuries received and also it is not a defense to this action that Leonard W. Elton at the time of his death was suffering from arteriosclerosis. (R. 82)

This Instruction is incorrect when we consider the question as to whether or not Leonard Elton died as a result of the pre-existing disease or as a result of the accident. If Leonard W. Elton at the time of his death was suffering from arteriosclerosis to the extent that the disease caused his death, although it may have been c o n t r i b u t e d to by the stress, it is a defense that a normal person would not have died as a result of this stress. In Instruction No. 17, the jury was instructed as follows, which should be read in connection with Instruction No. 18, which said:

INSTRUCTION NO. 17

You are instructed that negligence on the part of Leonard W. Elton is not a defense in this case and neither is voluntary exposure to danger such a defense. The policy of insurance here involved does not contain such a provision.

Unless the decedent intended to produce the very result which occurred, to-wit, his own death, the element of danger is both unimportant and immaterial. (R. 87)

INSTRUCTION NO. 18

You are instructed that whether or not Leonard W. Elton used good or bad judgment in connection with the amount of stress and strain to which he subjected himself prior to his death is immaterial. In this connection, if

you should find in accordance with these instructions that Leonard W. Elton suffered an accidental bodily injury as a result of unusual stress and strain which shortened his life it would be no defense, even if it were the fact, that he exercised bad judgment in subjecting himself to said stress and strain, if any. (R. 88)

We agree that under Utah law an accident may follow as a result of an intended or voluntary act when the results of that act are not the natural or probable result of the act itself. But what the Court has instructed the jury in Instruction Nos. 17 and 18 is that if Leonard Elton knew that by continuing to work he might thereby hasten his own death, which well he might have known if we believe the testimony of Dr. Dalrymple, but nevertheless continued to work, the plaintiff may recover. It is hard to conceive how it can be said that Leonard W. Elton died as a result of an accident. If he knew, or reasonably should have known that if he continued to work he would die and yet he voluntarily continued to do so. These Instructions had no place in this lawsuit. As pointed out by the *Kellogg* case, supra, the test of foreseeability is not whether Leonard Elton could foresee his own death but whether or not in light of his physical condition his death was reasonably foreseeable by reason of the disease from which he was suffering. However, as given, they allow the plaintiff in this case to recover even though his death could

have been reasonably foreseen by Leonard Elton or anyone if he continued to work, which is clearly not the law.

We are convinced that the jury in this case had no idea of the type of policy on which this action was brought or the circumstances under which the plaintiff was permitted to recover. They were not told about the policy by the Court. The net effect of what they were told was simply that if they found Leonard Elton was doing an unusual amount of work, causing an unusual amount of mental stress and strain, and that this somehow contributed to his death, the plaintiff was entitled to recover. This was clearly prejudicial.

CONCLUSION

In spite of the plaintiff's claims and attempts to characterize the defendant's policy as a special risk policy, it is apparent that the policy involved in this case, although it may have been more liberal than other accident policies, was clearly a policy insuring the beneficiaries of Leonard Elton in the event he died as a result of an accidental bodily injury. It is submitted that the plaintiff failed to sustain her burden of proof for the reason that as a matter of law there was nothing accidental or unforeseeable or unexpected about Leonard Elton's death on May 13, 1970. There was no accidental event or happening which brought it about. And even if we under some

kind of a strange construction attempted to define the stress and strain Leonard Elton may have been under immedately prior to the time of his death as an accidental event or happening, recovery must still be denied because this stress and strain was not the predominant cause of his death. As demonstrated by the evidence, Leonard Elton died by reason of the natural progression of the disease of arteriosclerosis. That disease had progressed to the point where it had produced a heart attack sixteen years before his death.

It is not surprising that the jury returned a verdict in favor of the plaintiff in this case in view of the Instructions of the Court. They had no idea of the type of insurance policy involved in this action. Under those Instructions the only elements which they had to find were that Leonard W. Elton was working hard at the time of his death and the fact that he was working played some role in his death on May 13, 1970.

It is submitted that under the law and the evidence in this case the Court should have granted the defendant's Motion for a Directed Verdict and dismissed the plaintiff's action and that this Court should reverse the trial court and direct that this case be dismissed. If we have failed to convince the Court of this, it at least appears that the issues in this case

were not fairly presented to the jury by the Court and that the verdict of the jury in this case should be set aside and the case returned to the District Court for a new trial.

Respectfully submitted,

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